Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

(4) (2)

Nos. 96-1712 and 96-1915

In the Supreme Court of the United States

OCTOBER TERM, 1996

DIONNE STAPLES, PETITIONER

v.

MICHAEL P. KELLY, ET AL.

MICHAEL P. KELLY, ET AL., CONDITIONAL CROSS-PETITIONERS

v.

DIONNE STAPLES, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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QUESTION PRESENTED

Whether a court may reduce the amount of actual damages awarded to the victim of housing discrimination in violation of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, on the ground that delay in the federal administrative processing of the complaint compounded the damages.

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DIONNE STAPLES, PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16[1]) is reported at 97 F.3d 118. An earlier decision of the court of appeals (Pet. App. B17-B33) remanding the case for further proceedings is reported at 3 F.3d

[1] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 96-1712.

951. The initial decision of the administrative law judge, United States Department of Housing and Urban Development (ALJ) (Pet. App. C34-C86), and the initial decision of the ALJ on remand (Pet. App. D87-D107) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1996. Petitions for rehearing were denied on January 24, 1997. Pet. App. E109-E110. The petition for a writ of certiorari in No. 96-1712 was filed on April 24, 1997, and placed on the docket on April 28, 1997. The conditional cross-petition for a writ of certiorari in No. 96-1915 was filed on May 28, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. a. In March 1990, petitioner, Dionne Staples,[2] a single mother of twin daughters, inquired about renting a two-bedroom apartment in a complex owned by respondents Michael P. Kelly and John T. Kelly, and their sister-in-law. Pet. App. B18-B19. Petitioner was told by someone from the realty office of respondent Michael P. Kelly that only one child was allowed per bedroom. *Id.* at B18. Respondents later rented the apartment to a couple with no children. *Id.* at B19. Petitioner ultimately rented an apartment in a different location that was less convenient to public trans-

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[2] We use "petitioner" to refer to Dionne Staples who is petitioner in No. 96-1712 and respondent in No. 96-1915. We use "respondents" to refer to Michael P. Kelly and John T. Kelly who are respondents in No. 96-1712 and conditional cross-petitioners in No. 96-1915. The Secretary, United States Department of Housing and Urban Development, is a respondent in both matters and is referred to as "HUD."

portation, to her family, to a grocery store, to a drug store, and to a library and parks. *Id.* at B18-19. Consequently, petitioner's commute to work was longer, costlier, and more complicated, and she had to rely on borrowed cars for transportation on the weekends. *Id.* at C39.

b. After her conversation with an individual in respondent's realty office, petitioner contacted a fair-housing organization which investigated respondents' apartment complex by using testers posing as prospective tenants and confirmed that respondents had a policy of permitting only one child per bedroom. Pet. App. B19-B20. On May 17, 1990, petitioner filed a complaint with the United States Department of Housing and Urban Development (HUD), alleging that she had been denied an apartment by respondents because of her familial status, in violation of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*[3] Pet. App.

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[3] The prohibition against familial status was added to the FHA through the Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619. As amended, the FHA makes it unlawful "[t]o refuse to * * * rent * * * or to refuse to negotiate for the * * * rental of, or otherwise make unavailable or deny, a dwelling to any person because of * * * familial status." 42 U.S.C. 3604(a). The FHA also prohibits "discriminat[ion] against any person in the terms, conditions, or privileges of * * * rental of a dwelling * * * because of familial status." 42 U.S.C. 3604(b). And the FHA makes it unlawful for any person engaged in the rental of a dwelling to make any "statement * * * with respect to the * * * rental of a dwelling that indicates any preference,

B20. Respondents answered the complaint on June 5, and a conciliation meeting with HUD officials was held on July 19, but was not successful. *Ibid.*

The HUD investigator completed his investigation on October 2, 1990. HUD issued a reasonable cause determination and charge of discrimination on March 2, 1992. Pet. App. B20. HUD's completion of its investigation and reasonable cause determination thereby exceeded the 100-day period following the filing of petitioner's complaint within which the Act requires HUD either to complete those tasks or to notify respondents of the reason for the delay.[4] *Id.* at C46.

2. HUD's charge alleged that respondents violated the FHA, 42 U.S.C. 3604, and various regulations promulgated thereunder. Pet. App. C35. Petitioner was granted permission to intervene and a HUD administrative law judge (ALJ) held a three-day hearing at the end of May 1992. *Id.* at B20. After a post-hearing briefing period, the ALJ issued an initial

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limitation or discrimination based on * * * familial status * * * or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. 3604(c).

"Familial status" is defined as "one or more individuals (who have not attained the age of 18 years) being domiciled with * * * a parent or another person having legal custody of such individual or individuals." 42 U.S.C. 3602(k)(1).

[4] The Act requires that, within 100 days of the filing of a complaint, HUD complete an investigation of an alleged fair housing violation and make a determination whether there is reasonable cause to believe such a violation occurred, "unless it is impracticable to do so." 42 U.S.C. 3610(a)(1)(B)(iv) and (g)(1). If HUD is unable to meet that deadline, HUD is supposed to notify the complainant and respondent in writing of the reasons for not doing so. 42 U.S.C. 3610(a)(1)(C) and (g)(1).

decision and order on August 26, 1992, which became the final order of the Secretary of HUD 30 days thereafter, pursuant to 42 U.S.C. 3612(h). Pet. App. C34-C86.

The ALJ found that respondent Michael P. Kelly, or agents under his direction and control, intentionally discriminated against petitioner because of her familial status, in violation of 42 U.S.C. 3604(a), and that their conduct violated 42 U.S.C. 3604(b) and (c). Pet. App. C54-C55. The ALJ concluded that respondent John T. Kelly was liable by virtue of his joint-ownership of the complex. *Id.* at C55-C56.

The ALJ rejected respondents' contention that the charge should be dismissed based on HUD's procedural missteps, including the fact that nearly two years elapsed between the date petitioner's complaint was filed and the date that HUD issued its charge of discrimination. The ALJ acknowledged that HUD had committed several procedural errors, including not notifying respondents that HUD would not be able to complete its investigation and determination of cause within the 100 days provided by statute. Pet. App. C60; but see *id.* at H145-H146. The ALJ found, however, that respondents were not substantially prejudiced in the preparation of their defense as a result. *Id.* at C60-C61.

The ALJ concluded that respondents were prejudiced with regard to damages because of HUD's delay in filing the charge of discrimination. Pet. App. C67-C68. The ALJ found that that fact did not constitute a legal basis for reducing the amount of damages owed petitioner, however, because "a search of the Act, its legislative history, and the cases * * * reveal[s] no authority for reducing the actual damages of a housing discrimination victim below the

proven amount because HUD has, without explanation, delayed presenting the case for adjudication." *Id.* at C68-C69. Therefore, the ALJ took HUD's delay into account instead when it considered HUD's request for civil penalties in the amount of $10,000. *Id.* at C75-C78. The ALJ explained that, under ordinary circumstances, he would have imposed a civil penalty less than $3,000, but he refused to impose any civil penalty in the instant case because the administrative delay increased the accrual period for the petitioner's damages and increased the amount of economic damages that respondents were ordered to pay. *Id.* at C76-C78.

The ALJ entered an injunction, ordering respondents to refrain from discriminating, to institute internal recordkeeping procedures, and to report to HUD for a specified period of time. Pet. App. C78-C83. The ALJ awarded Ms. Staples $10,430.76 in actual damages, $6,930.76 of which was for economic damages (compensating for the difference between the cost of respondents' apartment and the alternative housing petitioner obtained, the cost of finding that alternative, petitioner's increased transportation costs to work, increased commuting time, and time spent prosecuting her claim), and $3,500 was for intangible damages (emotional injury and loss of housing opportunity). *Id.* at C61-C66, C74. The ALJ refused to award damages for future losses because they were too speculative to be determined with reasonable specificity. *Id.* at C66-C67.

3. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. B17-B33. The court affirmed the ALJ's finding of unlawful discrimination and the injunction. *Id.* at B18. The court agreed, however, with respondents'

claim that they were denied the right to an objectively reasonable conciliation because the HUD investigator had participated in the conciliation process despite a HUD regulation that provides that, generally, agents should not take part in both the investigation and conciliation of the same case. 24 C.F.R. 103.300(c). Pet. App. B25-B32. The court therefore remanded the case to HUD so that the parties would "be given an opportunity to resolve this matter by means of a fair and reasonable conciliation effort." *Id.* at B32.

The court further ruled that, if conciliation failed, the matter was to be returned to the ALJ for further proceedings in light of the court's opinion. In addition, without elaboration, the court specified that "in no case should damages be assessed for the period during which HUD completely neglected this case." Pet. App. B32-B33. The court denied HUD's petition for rehearing. *Id.* at B17.

4. On remand, conciliation again failed and the matter was returned to the ALJ who, after further briefing, issued an initial decision which became the final order of the Secretary of HUD 30 days thereafter, pursuant to 42 U.S.C. 3612(h). Pet. App. D87-D108. The ALJ reconsidered the damages award in light of the court of appeals' decision. The ALJ rejected arguments by petitioner and HUD that he lacked authority to reduce the damages, noting that he was constrained to follow the court of appeals' decision. *Id.* at D90. Because the court of appeals did not identify a period "during which HUD completely neglected" the case, however, the ALJ ordered the parties to identify such a period or periods. *Id.* at D98. Respondents failed to identify any such period, arguing instead that HUD had completely neglected

the case from the day the complaint was filed. *Id.* at D99. The ALJ rejected that argument in light of HUD's investigation, attempt to conciliate, and reasonable cause determination, and ultimately concluded that, on the original record, he could not identify any specific period of complete neglect. *Ibid.* He declined to consider evidence submitted by HUD in support of its argument that it had, at no time, "completely neglected" the case. *Id.* at D99-D100. In order to comply with the court of appeals' order, the ALJ reduced the damages by the nominal amount of $1. See *id.* at D89, D91, D98-D101.

5. The court of appeals reversed the damages award. Pet. App. A1-A10. The court followed "the mandate of [the initial panel opinion] that a respondent in a housing discrimination case cannot be made to pay for the government's neglect," and concluded that the award for economic damages should have been based on an accrual period of one year (instead of 25 months) from the date of the incident. *Id.* at A5. The court explained that the "reasonable accrual period for damages in this case is twelve months: the period within which Congress intended HUD to carry out its administrative responsibilities and the standard term of a rental lease." *Ibid.* The court determined that petitioner's economic damages should be reduced to $3,571.03 based on its one-year limit. *Ibid.* In addition, the court reduced the amount of damages for emotional distress and loss of housing opportunity from $3,500 to $1,000 to account for the "period during which HUD mishandled the case," on

the basis that it "cannot ask the Kellys to pay for emotional distress caused by HUD." *Id.* at A6.[5]

In a dissenting opinion, Judge Ryan expressed his "strong disagreement" with the majority's reduction of the damages award to petitioner. Pet. App. A10-A16. He found "absolutely nothing in the record to support 'twelve months' as the appropriate period for the damage award," and noted that the majority did "not claim there is any record support for what it has done." *Id.* at A10-A11. He also noted that the parties, the ALJ, and the majority had not identified any period during which HUD completely neglected the case. *Id.* at A11. He concluded, therefore, that "[i]t is unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD." *Id.* at A11.[6]

DISCUSSION

We agree with petitioner that the court of appeals erred. The Secretary, United States Department of Housing and Urban Development (HUD), joined petitioner in seeking rehearing and in suggesting rehearing *en banc* in the court of appeals. HUD did not file a petition for a writ of certiorari, however, because the decision below appears to be the only

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[5] The court of appeals also affirmed the award of attorneys' fees to petitioner and reversed the denial of fees to respondents, ordering HUD to pay respondents $20,000 for fees and expenses. Pet. App. A6-A8, A10. Judge Ryan dissented from the order that HUD pay attorneys' fees to respondents. *Id.* at A11-A16.

[6] The court of appeals denied petitioner's and HUD's suggestions of rehearing en banc and the panel denied their petitions for rehearing, with Judge Ryan indicating that he would grant rehearing for the reasons stated in his dissent. Pet. App. E109-E110.

court of appeals decision to hold that HUD's delay can be used to deny full compensation to a victim of housing discrimination and, therefore, is an aberration that other courts of appeals are not likely to follow. Widespread application of the court of appeals' reasoning would, however, undermine substantially the remedial purposes of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, to make victims of housing discrimination whole. Thus, if the Court were to grant review, HUD would support petitioner. Also, if other lower courts were to adopt the approach of the court below, we believe that review by the Court could be warranted at such time.

Respondents' conditional cross-petition does not, in any event, warrant review. The court of appeals correctly refused to order dismissal of the charges based on respondents' contention (Cross-Pet. 12-20) that procedural missteps by HUD eliminated HUD's jurisdiction.

1. The court of appeals erred in reducing the amount of damages awarded to petitioner based on delay by HUD. Its ruling is inconsistent with the Court's holding in *Curtis* v. *Loether*, 415 U.S. 189 (1974), that, with regard to awards of actual damages under the FHA, "[t]here is no * * * discretion [t]here: if a [FHA] plaintiff proves unlawful discrimination and actual damages, [s]he is entitled to judgment for that amount." *Id.* at 197. The Court emphasized that "[a] damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Id.* at 195; see also *id.* at 196-197 (contrasting legal right to damages under FHA with discretionary award of backpay under Title

VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*).

Nothing in the FHA permits the damages awarded to a victim of housing discrimination to be limited to one year from the date a complaint is filed or to any other amount that is less than the actual damages suffered. The FHA requires an ALJ who has found that a respondent has engaged in a discriminatory housing practice, to order appropriate relief, including actual damages suffered by the aggrieved person. 42 U.S.C. 3612(g)(3). The ALJ in the instant case adhered to that requirement. The court of appeals upheld the ALJ's finding of unlawful discrimination and did not set aside any of the ALJ's findings regarding the injuries actually incurred by petitioner upon which the ALJ's damages amount was based. The court of appeals, therefore, erred in reducing the ALJ's damages award.

2. The court of appeals' ruling is in tension with the decision of the Court in *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). In that case, the Court made clear that a federal agency's delay in processing an injured person's claim does not justify reducing the compensatory award to that person. The Court held that a court of appeals may not, on account of delay (approximately four years) by the National Labor Relations Board (Board), reduce a backpay award that an employer has been ordered by the Board to pay to certain employees because of the employer's unfair labor practice. *Id.* at 259. The Court did not disturb the lower court's finding that the Board "had been guilty of 'inordinate' delay," in violation of the requirement that it "proceed with reasonable dispatch to conclude any matter presented to it." *Id.* at 262, 264 (citing former Section 6(a) of the Admin-

istrative Procedure Act, 5 U.S.C. 1005(a) (1964)). The Court assumed that the Board's delay violated that statutory mandate, but nonetheless concluded that the Board was "not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 265. In *NLRB* v. *International Ass'n of Bridge Ironworkers, Local 480*, 466 U.S. 720 (1984) (per curiam), the Court reaffirmed the now well-established principle of *Rutter-Rex Mfg. Co.* that the Board cannot "punish[] employees for the Board's nonfeasance." 466 U.S. at 725.

The same principle applies in the instant case. As in *Rutter-Rex Mfg. Co.*, the court of appeals found that the federal agency's delay violated a statutory mandate to act expeditiously. On that basis, the court of appeals decreased the amount of the award the agency had ordered the wrongdoer to pay to the victim of the unlawful conduct that prompted the agency review. But, the modification of the administrative award left the victim "worse off than [she] would have been but for" the unlawful conduct of the wrongdoer. See *Rutter-Rex Mfg. Co.*, 396 U.S. at 263. And, the modification undermined the purposes of the administrative award—"vindicat[ing] the public policy of the statute by making the [complainant] whole for losses suffered on account of" the conduct that violated the statute. See *ibid.* Therefore, proper resolution of the instant case would lead to a similar result here—reversal of the court of appeals' judgment and a ruling that petitioner is entitled to her full damages award. Cf. *Kraszewski* v. *State Farm Gen. Ins. Co.*, 912 F.2d 1182, 1186 (9th Cir. 1990) (applying *Rutter-Rex Mfg. Co.* principle in case under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

2000e *et seq.*, to preclude reduction of backpay awards because of court delay, noting that the remedial provisions of the NLRA and Title VII are analogous and have similar purposes), cert. denied, 499 U.S. 947 (1991); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932-933 (10th Cir. 1979); see also Pet. 14.

3. The court of appeals' decision is inconsistent with the overall enforcement scheme of the FHA. Before 1988, victims of housing discrimination in violation of the FHA had to file private civil actions in order to vindicate their statutory rights. A gap in enforcement resulted because such private litigation proved to be too costly or time-consuming for many housing discrimination victims. In 1988, when Congress enacted the Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619, one of its central purposes was to create more effective remedies for violations of the Act by giving HUD a more active role in enforcement of the Act, including the authority to award actual damages to victims of discrimination, and by creating an administrative process through which victims could vindicate their statutory rights, instead of pursuing private litigation. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 5-7, 13, 16-17 (1988); see also *HUD* v. *Blackwell*, 908 F.2d 864, 868-869 (11th Cir. 1990) (discussing 1988 enactment of administrative enforcement mechanism).

The court of appeals' decision, however, creates a disincentive to discrimination victims to rely on that administrative process and on HUD's authority to award damages. As petitioner points out (Pet. 20), if she had chosen to vindicate her rights through a private lawsuit instead of the administrative process, she would have had two years within which to bring

her civil action. 42 U.S.C. 3613(a)(1)(A) (two-years' statute of limitations). That limitations period would have been tolled during any period in which HUD had been investigating her complaint. 42 U.S.C. 3613(a)(1)(B). And, petitioner could have chosen to pursue a private lawsuit in lieu of an administrative adjudication up to the beginning of the hearing on the merits before the ALJ. 42 U.S.C. 3613(a)(3). Had petitioner filed a civil action, she would have been entitled, under *Curtis* v. *Loether*, *supra*, to a full award of actual damages. Instead, however, as a result of petitioner's having pursued relief through administrative channels, the court of appeals set an arbitrary one-year accrual period on petitioner's actual damages—an approach which threatens to erode the intended benefit and cost-effectiveness of the administrative process under the FHA, by placing the risk of budgetary constraints or other factors that might cause delay in the administrative process on the victim of discrimination who invokes that process.

Moreover, the one-year limit on accrual of actual damages established by the court of appeals conflicts with the period of time within which actual damages may accrue under the FHA's timeframe for a final administrative determination of damages. It is clear from that statutory timeframe that Congress contemplated that actual damages could accrue for longer than 12 months. A victim of discrimination may file a complaint with HUD up to one year after a discriminatory housing practice has occurred or terminated. 42 U.S.C. 3610(a)(1)(A)(i). HUD has 100 days to investigate and bring a charge, 42 U.S.C. 3610(a)(1)(B)(iv) and (g)(1), and longer, so long as it notifies the complainant and respondent in writing of

the reasons why it was unable to complete the investigation or make the probable cause determination within 100 days. 42 U.S.C. 3610(a)(1)(C) and (g)(1). The ALJ has a 120-day period following issuance of the charge within which to commence a hearing on the merits or, again, a longer period is permitted so long as the ALJ notifies the parties of the reason for the delay. 42 U.S.C. 3612(g)(1). Thus, the FHA, on its face, anticipates that significantly more than 12 months may elapse from the time the discriminatory housing practice occurred or terminated until the date of an administrative hearing. And the FHA clearly authorizes a longer period of time where the agency notifies the parties of the reasons for any delay, as HUD maintained it did here. See Pet. App. H145-H146. The court of appeals' decision limiting the accrual period for actual damages to 12 months from the date of the incident cannot be reconciled with this statutory scheme.[7]

4. Cross-petitioners contend (Cross-Pet. 12-20) that HUD completely neglected this case from the date the complaint was filed and therefore was divested of jurisdiction over the matter.

The court of appeals' refusal to order the charges dismissed on account of HUD's procedural missteps, which did not prejudice respondents' defense, is in accord with well-established principles and does not

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[7] The court of appeals' decision also raises the specter of a two-tiered system of justice that works to the detriment of complainants who need to rely on the federal administrative process because they cannot afford to bring an action in court. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 438-442 (1982) (opinion of Blackmun, J., joined by Brennan, Marshall, O'Connor, JJ.); *id.* at 443-444 (opinion of Powell, J., concurring in judgment, joined by Rehnquist, J.)

merit further review. The failure of an administrative agency to comply with procedural requirements, including statutory time limits, does not automatically eradicate its jurisdiction to enforce the statute. In *Brock* v. *Pierce County*, 476 U.S. 253, 259-260 (1986), the Court held that failure of the Secretary of Labor to issue a final determination as to the misuse of federal funds by a grant recipient did not preclude the Secretary from recovering the misused funds. In doing so, it relied on the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 260 (quoting *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)). The Court emphasized that statutory language mandating a federal agency to act within a certain time, does not, "standing alone, divest the Secretary of jurisdiction to act after that time." *Id.* at 266; see *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanctions").[8]

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[8] *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), does not suggest a different result. See Cross-Pet. 20. There the Court held that an action filed by a private plaintiff after the expiration of the 300-day time period specified in Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), was time-barred. As this Court noted in *Pierce County*, 476 U.S. at 261, *Mohasco Corp.* involved the failure of an individual to comply with a statute of limitations that required only the filing of a complaint within a specified period. In contrast, the statutory time limitations in *Pierce County* and in this case require a

As in *Pierce County*, nothing in the present statute or its legislative history indicates that Congress intended to terminate HUD's jurisdiction if it failed to meet the statutory time schedule for administrative review. Indeed, the FHA indicates that Congress itself intended to monitor noncompliance with the statutory timeframe, and it does not suggest that noncompliance would elimi nate administrative jurisdiction. See 42 U.S.C. 3608(e)(2)(B)(i), (ii) and (iii) (requiring that HUD report to Congress, at least annually, identifying "the number of instances (and reasons therefor)" in which HUD did not complete investigations as required by Section 3610(a)(1)(B), did not make cause determinations within the time specified in Section 3610(g), and did not commence hearings or make findings and conclusions as required by Section 3612(g)).[9] Accordingly, the conditional cross-petition for a writ of certiorari should be denied.

5. Despite the court of appeals' errors, we did not file a petition for a writ of certiorari, as noted above, because the decision below appears to be an aberration that other courts are not likely to follow. Moreover, the decision below seems to be a departure from the court of appeals' own precedent, in which it has held that the purpose of the Fair Housing Act is to make

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federal agency to make a substantive legal determination about whether a particular set of facts, developed after investigation, establish a violation of the statute. As the *Pierce County* Court noted, "[t]his is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control." *Ibid.*

[9] Cross-Petitioners also challenge (Cross-Pet. 20-21) the court of appeals' attorneys' fees determinations, but they do not suggest any reason justifying review by this Court.

whole the victims of discrimination, *United States* v. *City of Birmingham*, 727 F.2d 560, 566 (6th Cir.), cert. denied, 469 U.S. 821 (1984), and that a reviewing court should not deprive a victim of conduct in violation of federal law of her right to make-whole relief because of purported neglect by a federal administrative agency. *International Bhd. of Elec. Workers, Local 648* v. *NLRB*, 440 F.2d 1184, 1185 (6th Cir. 1971); *NLRB* v. *Seligman & Assoc., Inc.*, 808 F.2d 1155, 1161-1162 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988). The absence of legal analysis and citation to applicable precedent[10] lends credence to the view of the dissenting judge below that the decision appears to have been triggered by concerns unique to this case (Pet. App. A10, A11) and therefore does not reflect a doctrinal shift in the law of the circuit.

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[10] Although the panel majority purported to anchor its decision in the Sixth Circuit's prior decision in *Baumgardner* v. *HUD*, 960 F.2d 572 (1992), the ruling below goes well beyond *Baumgardner*. Although the *Baumgardner* court stated that "HUD's delay and handling did have an adverse impact on the question of damages," *id.* at 580, it did not reduce any damages to the complainant on that basis. The *Baumgardner* court reduced the compensatory damages award because of lack of proof of economic loss to the complainant, *ibid.*, and, based on "the facts of th[at] case," the lack of necessity for an award of "presumed damages" for loss of civil rights, *id.* at 583. The perception of the court of appeals below that *Baumgardner* supported its decision to reduce petitioner's damages award may, in part, be attributable to the fact that the Court in *Baumgardner* erroneously referred to the civil penalty as a "civil penalty damage award." *Ibid.* See Pet. App. C77 n.26; *id.* at D96 (ALJ explaining confusion between damages and civil penalties underlying *Baumgardner*). The ALJ here eliminated the civil penalty, however, an action that more appropriately places the consequences of any delay on the entity that caused it.

Respectfully submitted.

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JULY 1997